

**WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD**

SYNOPSIS REPORT

Decisions Issued in July 2016

The Board's monthly reports are intended to assist public employers covered by a grievance procedure to monitor significant personnel-related matters which came before the Grievance Board, and to ascertain whether any personnel policies need to be reviewed, revised or enforced. W. Va. Code §18-29-11(1992). Each report contains summaries of all decisions issued during the immediately preceding month.

If you have any comments or suggestions about the monthly report, please send an e-mail to wvgb@wv.gov.

NOTICE: These synopses in no way constitute an official opinion or comment by the Grievance Board or its administrative law judges on the holdings in the cases. They are intended to serve as an information and research tool only.

TOPICAL INDEX
HIGHER EDUCATION EMPLOYEES

<u>KEYWORDS:</u>	Discrimination; Favoritism; Qualifications; Job Descriptions; Discretion, Work Hours; Arbitrary and Capricious
<u>CASE STYLE:</u>	<u>Ritter v. BridgeValley Community and Technical College</u> DOCKET NO. 2016-0160-BVCTC (7/27/2016)
<u>PRIMARY ISSUES:</u>	Whether Respondent discriminated and/or abused its discretion in the facts of this case.
<u>SUMMARY:</u>	<p>Grievant contends Respondent discriminated against her and demonstrated favoritism with a later hiree. Grievant contends her assigned designation of Assistant Professor is insufficient with negative fiscal repercussions. There was a change of Grievant's employee category from non-classified to faculty. Grievant argues that with her appointment to faculty status she should have been awarded the rank of Professor.</p> <p>The crux of a discrimination claim is that a grievant is impermissibly treated differently than similarly situate employees. Grievant's initial appointment as Assistant Professor is consistent with initial appointments of other BridgeValley faculty with doctoral degrees, and is consistent with BOG Policy B-1 and Faculty Evaluation Guidelines. It is not established that Respondent abused its discretion in determining Grievant's faculty status. Grievant contends illegal conduct in that Respondent subsequently hired an individual and said individual is compensated at an amount similar to Grievant's salary. A grievant's belief that the supervisor's management decision(s) are incorrect is not grievable unless these decisions violate some rule, regulation, or statute, or constitute a substantial detriment to, or interference with, the employee's effective job performance or health. Favoritism is not established. Grievant did not establish that Respondent's actions were in violation of any governing rule, regulations or laws. This grievance is DENIED.</p>

KEYWORDS:

Classification; Position Information Questionnaire; Point Factors; Job Duties; Knowledge; Scope and Effect; Impact of Actions; Nature of Actions; Licenses; Certifications; Changes to PIQ; Minimum Qualifications

CASE STYLE:

Chico v. West Virginia University

DOCKET NO. 2015-0777-CONS (7/14/2016)

PRIMARY ISSUES:

Whether Grievant demonstrated that he is not properly classified.

SUMMARY:

Grievant asserted that the Position Information Questionnaire he completed and signed, detailing his job duties and responsibilities was improperly changed after he signed it, and that it was not properly reviewed by Respondent. Grievant did not demonstrate that Respondent's Human Resources Office personnel did anything improper by making changes to this form to reflect the minimum qualifications for the position, that the information he placed in the Position Information Questionnaire properly reflected the minimum qualifications for his job, or that his job was not properly reviewed. Grievant also asserted that his position should receive credit for each of the licenses he must acquire. The Job Evaluation Plan does not address awarding any credit for a license, but the higher education Job Classification Committee made the determination that every position which must acquire a license of any kind will be awarded an additional .5 in the degree level "Education," regardless of how many licenses are required. Grievant did not demonstrate that this determination by the Committee was arbitrary and capricious or clearly wrong. Finally, Grievant challenged the degree levels assigned to his position in the point factor Scope and Effect, Nature of Actions and Impact of Actions. Grievant did not demonstrate his position was entitled to a higher degree level in any point factor. Grievant also failed to demonstrate that a Job Title should be created for his position.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
PROFESSIONAL PERSONNEL

<u>KEYWORDS:</u>	Reduction in Force; Transfer; Contract Termination; Reorganization; Central Office; Administrators; Deficit; Reduction in Need; Arbitrary and Capricious
<u>CASE STYLE:</u>	<u>Nichols, et al. v. Calhoun County Board of Education</u> DOCKET NO. 2015-0970-CONS (7/15/2016)
<u>PRIMARY ISSUES:</u>	Whether Grievants proved that Respondent's decision to terminate their current contracts to allow for the reorganization of the central office was arbitrary and capricious.
<u>SUMMARY:</u>	Grievants were employed by Respondent in its Central Office as full-time administrators. Facing a large budget deficit, the superintendent recommended to the Respondent the termination of all Central Office employee contracts so that the staff could be reorganized to reduce the number of positions by 1.5 to save money. After personnel hearings requested by Grievants, Respondent voted to accept the recommendations of the superintendent, thereby terminating the current contracts held by the Grievants. Two Grievants were eventually transferred into other positions, and one Grievant's employment was terminated. Following the vote to terminate Grievants' current contracts, the reorganization of the Central Office was completed. Grievants claim no statutory or procedural violations regarding their reductions in force or transfers. Grievants argue that there can be no elimination of positions without reduction in need, and that the Board's actions in accepting the recommendations of the superintendent were arbitrary and capricious. Respondent denies all of Grievants' claims, and argues that Grievants' contracts were properly terminated in order to allow for the reorganization of the Central Office as a way to save money. Grievants failed to prove their claims by a preponderance of the evidence. Therefore, this grievance is DENIED.

KEYWORDS: Selection; Most Qualified Applicant; Classroom Teaching Position; Interview Process; Arbitrary and Capricious

CASE STYLE: Dye v. Wirt County Board of Education
DOCKET NO. 2016-0181-WirED (7/14/2016)

PRIMARY ISSUES: Whether Grievant established that her non-selection for a posted classroom teaching position was arbitrary and capricious.

SUMMARY: Grievant was one of two applicants for a classroom teaching position in physical education at the Wirt County Primary Center (“WCPC”). Grievant had been employed by the county at Wirt County High School as a health and physical education teacher since 2006, held satisfactory evaluations of her performance as a classroom teacher, had seniority in the county, and had greater academic achievement based upon the undergraduate grade point averages of Grievant and the successful applicant, respectively. Both Grievant and the successful applicant possessed the necessary certification for the position, held bachelor’s degrees, and had completed specialized training relevant to performing the duties of the job. Grievant and the successful applicant were interviewed by a committee appointed by the faculty senate at WCPC, along with the school principal. Grievant and the successful applicant were each asked the same set of questions by the hiring committee with the school’s principal present. The hiring committee members and principal determined that the successful applicant provided superior answers to the questions asked in regard to classroom discipline philosophy, in that her answers were more in line with the disciplinary approach being applied at WCPC. Both the faculty senate hiring committee and the school principal recommended the successful applicant, Megan Jones, to fill the teaching vacancy at WCPC. The county superintendent concurred with their recommendation and nominated Ms. Jones to be hired by WCBOE.

In accordance with pertinent provisions in W. Va. Code § 18A-4-7a and West Virginia Board of Education Policy 5000, because the faculty senate hiring committee and school principal recommended the same applicant, and the county superintendent concurred with that recommendation, the county board was required to appoint the successful applicant to the physical education teaching vacancy at WCPC. Grievant failed to establish that there was any substantial flaw in the selection process or that the actions of the board, in the circumstances presented, were either arbitrary and capricious, or an abuse of the board’s discretion.

KEYWORDS:

Motion to Dismiss; Moot; Advisory Opinion; Relief

CASE STYLE:

Cundiff v. Braxton County Board of Education

DOCKET NO. 2016-1549-CONS (7/27/2016)

PRIMARY ISSUES:

Whether Respondent proved the grievance must be dismissed as all the relief requested in the grievance is either moot or speculative.

SUMMARY:

Grievant is employed by Respondent and was supervised by a principal who has now retired. All but one of Grievant's requests for relief were related to the working conditions she alleged the principal created. As the principal is now retired from his position as principal and is not employed as a regular or substitute employee, all relief requested relating to the principal is now moot. The remaining request for relief, requesting waiver of a certain provision if she were to receive a new position, is speculative. Grievant's contention that the alleged improper working conditions would recur if the principal was hired as a substitute administrator is also speculative. A decision on a speculative claim would be advisory, and the Grievance Board does not issue advisory opinions. Accordingly, the grievance is dismissed.

TOPICAL INDEX
COUNTY BOARDS OF EDUCATION
SERVICE PERSONNEL

KEYWORDS: Classification; Qualifications; Selection; ECCAT Certification; Seniority; Early Childhood Classroom Assistant Teacher; Aide; Kindergarten

CASE STYLE: Cosner v. Gilmer County Board of Education and Teresa Skinner, Intervenor
DOCKET NO. 2015-1520-GilED (7/27/2016)

PRIMARY ISSUES: Whether Grievant demonstrated that she held the required certification for the position at issue.

SUMMARY: Grievant is employed by Respondent as an Aide. She bid on a posted Aide/ECCAT position, which required ECCAT certification. Although Grievant was the most senior applicant in the Aide classification, she did not at any time hold ECCAT certification, nor did she demonstrate that she had completed all the requirements necessary to obtain ECCAT certification. Grievant did not demonstrate she was entitled to placement in the posted position.

KEYWORDS: Selection; Summer Position; Job Posting; Most Senior Applicant; Arbitrary and Capricious

CASE STYLE: Howard, et al. v. Marshall County Board of Education
DOCKET NO. 2015-1630-CONS (7/27/2016)

PRIMARY ISSUES: Whether Grievants established that Respondent selection decision was arbitrary and capricious.

SUMMARY: Grievants are employed by Respondent as regular bus operators. Grievants argue that, as more senior regularly employed bus operators, they are entitled to preference for a summer job awarded to another applicant. Based on the unique facts of this case, Grievants were unable to establish that Respondent's use of the arbitrary and capricious standard in filling the position was a violation of the applicable law.

KEYWORDS: Discrimination; Multiclassified Employees; Extra Duty; Bus Trips; Regular Shift; Priority Assignment; Substitute

CASE STYLE: Deaton, et al. v. Wood County Board of Education
DOCKET NO. 2015-0907-CONS (7/29/2016)

PRIMARY ISSUES: Whether Grievants proved that Respondent's refusal to allow them to take extra duty assignments that were scheduled during their regular eight-hour shifts was discriminatory, or otherwise improper.

SUMMARY: Grievants are employed by Respondent in multiclassified positions. All but one of the Grievants are mechanic/bus operators. The remaining Grievant is a handyman/bus operator. Grievants assert claims of discrimination against Respondent because Respondent will not allow them to accept extra duty bus trips that are scheduled to occur during their regular eight-hour work days. Grievants also allege violations of an unwritten policy that requires them to be given equal consideration for extra duty trips. Respondent denies Grievants' claims, and asserts that it is allowed to limit the extra duty assignments Grievants may accept to those that do not interfere with their priority assignments. Grievants failed to prove their claims by preponderance of the evidence. Therefore, this grievance is DENIED.

KEYWORDS: Classification; Job Duties; Res Judicata; Timeliness; Untimely Filed; Motion to Dismiss

CASE STYLE: Harris v. Wood County Board of Education
DOCKET NO. 2016-0226-WooED (7/12/2016)

PRIMARY ISSUES: Whether Respondent proved by a preponderance of the evidence that this grievance was untimely filed.

SUMMARY: Grievant is employed by Respondent as a Secretary III. Grievant has been asserting, through a series of grievances, that based upon her duties, she should be reclassified by the Board of Education. Respondent moved to dismiss this grievance as untimely and also that this case is barred by the doctrine of res judicata. Respondent proved by a preponderance of the evidence that this grievance was untimely filed, and the case is barred by the doctrine of res judicata.

TOPICAL INDEX
STATE EMPLOYEES

<u>KEYWORDS:</u>	Classification; Pay Grade; Job Duties and Responsibilities; Reallocation; Arbitrary and Capricious
<u>CASE STYLE:</u>	<u>Newhouse v. Insurance Commission and Division of Personnel</u> DOCKET NO. 2016-0104-CONS (7/26/2016)
<u>PRIMARY ISSUES:</u>	Whether Grievant proved that the decision regarding which classification was the best fit for her position was clearly wrong or arbitrate and capricious.
<u>SUMMARY:</u>	Grievant contends that DOP's determination that the Paralegal classification is the best fit for her position was clearly wrong as well as arbitrary and capricious. She point to a long history of similar positions being classified in the Employment Programs Claims Deputy classification to support her contention that her position would best fit in that classification. DOP demonstrated that Grievant's position did not perform one of the essential functions required for the Claims Deputy classification and that her duties were consistent with the Paralegal classification. Grievant did not prove that the DOP's determination was clearly wrong.

<u>KEYWORDS:</u>	Selection; Most Qualified Applicant; Years of Service; Favoritism; Arbitrary and Capricious
<u>CASE STYLE:</u>	<u>McCartney v. Division of Rehabilitation Services</u> DOCKET NO. 2015-0772-DEA (7/11/2016)
<u>PRIMARY ISSUES:</u>	Whether Grievant meet her burden of proving the selection process was insufficient or flawed.
<u>SUMMARY:</u>	Grievant is employed by the West Virginia Division of Rehabilitation Services as an Office Assistant III with the Disability Determination Services Section. The Division of Rehabilitation Services issued a posting for a Rehabilitation Services Associate on October 27, 2014. Grievant applied and interviewed for the position; however, she was not selected for the position. The record did not establish that favoritism played a part in the selection process. In addition, Grievant failed to meet her burden and demonstrate that Respondent's selection process was flawed. Grievant did not demonstrate that the decision to select another applicant for the position in question was unlawful or an action that was arbitrary and capricious.

KEYWORDS: Termination; Driving Privileges; Driver's License; Job Requirement; Uninsurable

CASE STYLE: Earls v. Department of Health and Human Resources/Bureau for Children and Families

DOCKET NO. 2015-1269-DHHR (7/7/2016)

PRIMARY ISSUES: Whether Respondent proved the occurrence of violations of driving regulations which were the basis for terminating Grievant's employment.

SUMMARY: As a Case Aide, Grievant's predominate duty was to transport juvenile and infant clients to and from treatment facilities all around West Virginia, and occasionally in surrounding states. While transporting a juvenile client and his treating psychologist from Mercer County, West Virginia, to a treatment facility in Kingston, Tennessee, Grievant had extreme difficulty staying awake and occasionally went off the road momentarily. She violated other DHHR regulations for driving clients on the trip. Respondent dismissed Grievant from employment as a result of these incidents.

Grievant notes that in addition to this job, she was finishing her college degree, working a second job, and parenting a small child. She argues that no accident occurred and the adult passenger exaggerated the incidents which actually happened. Grievant asserts that under all the circumstances Respondent failed to prove by a preponderance of the evidence, the charges that Grievant engaged in reckless and dangerous driving behavior. While Grievant's efforts to support her family and complete her education are commendable, Respondent proved the Grievant violated DHHR policy, and her driving behavior put the passengers and herself at risk of serious injury. Additionally, Grievant lost her privilege to drive a vehicle on State business, which was the predominate duty of her job. The grievance must be DENIED.

KEYWORDS: Termination; Failure to Report to Work

CASE STYLE: Farnsworth v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital
DOCKET NO. 2015-1768-CONS (7/27/2016)

PRIMARY ISSUES: Whether Respondent demonstrated good cause for dismissing Grievant.

SUMMARY: Grievant worked at the William R. Sharpe, Jr. Hospital as a Health Service Worker. Grievant injured her knee at work and went on Workers' Compensation leave from July 2013 to April 2014. Grievant's Workers' Compensation claim closed in June 2014, and she did not return to work. Respondent notified her that she needed to return to work or to provide a doctor's statement that she was unable to return to work. Grievant did not provide a release to return to work or a doctor's statement that she was unable to return to work. Respondent relies on the Division of Personnel Administrative Rule providing that the failure of an employee to report to work promptly at the expiration of a leave of absence without pay, except for satisfactory reasons submitted in advance to and approved by the appointing authority, is cause for dismissal. Respondent met its burden of proof and demonstrated that Grievant was terminated for good cause. This grievance is DENIED.

KEYWORDS: Classification; Job Duties; Position Description Form; Arbitrary and Capricious

CASE STYLE: McDaniel v. Division of Highways and Division of Personnel
DOCKET NO. 2015-1300-DOT (7/6/2016)

PRIMARY ISSUES: Whether the Division of Personnel's determination of the appropriate classification for the position was arbitrary and capricious.

SUMMARY: Grievant, a Transportation Worker 2, asserts that his position should be classified as a Transportation Worker 3. Grievant's employer, the Division of Highways asserts that the position is properly classified as a Transportation Worker 2. Respondent Division of Personnel reviewed the position Grievant holds based on the Position Description Form Grievant completed and determined that the position was properly classified as a Transportation Worker 2. Grievant failed to prove that the duties he performs are a better fit for the Transportation Worker 3 position. The Division of Personnel's determination of the appropriate classification for the position was not arbitrary and capricious. Accordingly, the grievance is denied.

<u>KEYWORDS:</u>	Selection; Seniority; Job Experience; Arbitrary and Capricious
<u>CASE STYLE:</u>	<u>Viers v. Division of Highways</u> DOCKET NO. 2015-0863-DOT (7/6/2016)
<u>PRIMARY ISSUES:</u>	Whether Grievant is the most qualified applicant for the position at issue.
<u>SUMMARY:</u>	Grievant alleged that he should have been selected over the successful applicant for the position of Highway Administrator II. An interview committee was appointed to recommend a candidate for the position. After the interviews, the committee selected Intervenor for the position based upon his qualifications, experience and his interview performance. Grievant failed to establish any unlawful action. Grievant failed to persuasively demonstrate that he was the most qualified application for the position. Respondent did not act arbitrarily or capriciously or abuse its broad discretion in selecting the Intervenor for the position. This grievance is DENIED.
<u>KEYWORDS:</u>	Part-Time Seasonal Employee; Motion to Dismiss; Statutory Authority
<u>CASE STYLE:</u>	<u>Akers v. Division of Natural Resources</u> DOCKET NO. 2016-0084-DOC (7/7/2016)
<u>PRIMARY ISSUES:</u>	Whether the Grievance Board has statutory authority to hear this grievance.
<u>SUMMARY:</u>	Grievant is employed as a part-time seasonal employee by the Division of Natural Resources at Pipestem Resort State Park. Grievant protests Respondent's failure to select him for a permanent position. Respondent moved to dismiss, asserting Grievant lacks standing to file a grievance as a seasonal employee. Grievant argued that Respondent failed to prove Grievant was a seasonal employee, that Grievant's years of service entitled him to participate in the grievance process, and that Respondent is estopped from moving to dismiss. Respondent proved Grievant does not meet the definition of "employee" under the grievance statute and lacks standing to file a grievance. Respondent failed to follow the Grievance Board's procedural rules, however, the Grievance Board has no authority to hear the grievance, so the grievance must be dismissed.

KEYWORDS:

Exempt; Non-Exempt; Supervision; Executive Exemption; Administrative Exemption; Management; Overtime; Fair Labor Standards Act

CASE STYLE:

Bartlett v. Division of Highways

DOCKET NO. 2015-1125-DOT (7/12/2016)

PRIMARY ISSUES:

Whether Grievant was an exempt employee for overtime purposes.

SUMMARY:

The Grievance Board issued a Decision finding that Grievant was entitled to overtime pay, because he did not supervise at least two employees, and accordingly, he did not fit within the definitions in the executive exemption. Neither party appealed that Decision. Respondent paid Grievant backpay for the overtime he had worked, and then told Grievant that he would be the supervisor of two employees, and would no longer be an exempt employee. Grievant filed this grievance and then retired. Respondent filed a Motion to Dismiss the grievance as moot due to Grievant's retirement, and because the Grievance Board cannot enforce its own decisions. While Respondent is correct that Grievant must go to the Circuit Court of Kanawha County to enforce a Grievance Board Decision, and that any claims of retaliation would be moot, Grievant put on evidence and argument at the level three hearing regarding an issue that is grievable; that is, whether Respondent accomplished its goal of changing his status to exempt by adding certain supervisory duties to Grievant's responsibilities. The issue remains of whether Grievant is entitled to back pay for overtime worked during the period immediately preceding his retirement. Grievant was assigned to supervise two employees, and met the other requirements for exempt status, and is not entitled to back pay for any overtime worked.

KEYWORDS: Selection Process; Most Qualified Applicant; Arbitrary and Capricious

CASE STYLE: Sims v. Division of Highways

DOCKET NO. 2016-0433-DOT (7/11/2016)

PRIMARY ISSUES: Whether Grievant demonstrated that he was the most qualified applicant for the position in discussion.

SUMMARY: Grievant alleged that he should have been selected over the successful applicant for the position of Transportation Crew Supervisor. An interview committee was appointed to recommend a candidate for the position. After the interviews, the committee recommended the Intervenor for the position based upon his qualifications and his interview performance. Grievant failed to establish any unlawful action. It was not established that Respondent acted arbitrarily or capriciously or abused its broad discretion in selecting the Intervenor for the position. Grievant failed to persuasively demonstrate that he was the most qualified applicant for the position. This grievance is DENIED.